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STRENGTHENING JUDICIAL COOPERATION IN CRIMINAL MATTERS IN THE LIGHT OF EU ENLARGEMENT

*by Lorenzo Salazar**

SUMMARY: 1. Introduction. – 2. The Challenge. – 3. A Radical Change for the Albanian Judiciary. – 4. Mutual Recognition and Mutual Trust. – 5. The Way Forward

1. Introduction

The progressive enlargement of the European Union has fundamentally transformed the landscape of judicial cooperation in criminal matters, creating both unprecedented opportunities and significant challenges for the administration of justice across Member States.

When the abolition of internal border controls was conceived in 1985 through the Schengen Agreement¹ (supplemented by the Schengen Convention of 1990)², the European Communities comprised just ten Member States. As the Union has progressively expanded to encompass twenty-eight (now twenty-seven following Brexit)³ diverse nations and as many legal systems, the imperative to strengthen judicial cooperation mechanisms has become increasingly critical to maintaining the security, stability, and rule of law that underpin the European project.

2. The Challenge

I spent many years an extensive experience in Brussels negotiating EU instruments in the field of criminal cooperation, both on the mutual recognition and approximation of criminal law sides (the European Arrest Warrant⁴, Eurojust⁵, organised crime⁶, terrorism⁷ etc.). Throughout this experience I also had the opportunity to witness, from a privileged

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¹ *Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders*, of 14 June 1985, in OJ L 239, of 22 September 2000.

² *Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders*, of 19 June 1990, in OJ L 239, of 22 September 2000.

³ *Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community*, of 12 November 2019, in OJ C 384I, of 12 November 2019.

⁴ Council Framework Decision 2002/584/JHA, *on the European arrest warrant and the surrender procedures between Member States*, of 13 June 2002, in OJ L 190, of 18 July 2002.

⁵ Regulation (EU) 2018/1727 of the European Parliament and of the Council, *on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA*, of 14 November 2018, in OJ L 295, of 21 November 2018.

⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *on the EU Strategy to tackle Organised Crime 2021-2025*, of 14 April 2021, COM/2021/170 final.

⁷ Directive (EU) 2017/541 of the European Parliament and of the Council, *on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA*, of 15 March 2017, in OJ L 88, of 31 March 2017.

vantage point, the largest enlargement in EU history (with ten new Member States joining in 2004 and three more in the following years)⁸.

I have also observed other “accessions” to international organisations and conventions (e.g., Council of Europe, OECD); from my very same personal experience, one could criticise but should neither be surprised nor frustrated when observing that the “members of the club” may prove more demanding regarding the exact fulfilment of the obligations deriving from the existing *acquis* for those queuing outside than for those who are already members.

When examining the outcomes of the recent Second Accession Conference with Albania (15 October 2024)⁹, which opened negotiations with Albania on Cluster 1, the significant progress made by Albania on Chapters 23 and 24 must be commended, whilst more *interim* benchmarks still need to be met before the next steps in the cluster negotiation process can be taken.

In particular, regarding Chapter 23 (Judiciary and fundamental rights), Albania must further implement its comprehensive justice reform, delivering improvements in the impartiality, independence, accountability, professionalism, quality, and efficiency of the judicial system¹⁰.

Concerning Chapter 24 (Justice, freedom and security), the priorities encompass various measures including the fight against organised crime, maintaining records of investigations, prosecutions, and final convictions across all areas of serious and organised crime, measures against money laundering, seizure and final confiscation of assets of illicit origin and asset recovery, and measures dismantling networks of trafficking in human beings with particular focus on the significant impact on women and girls¹¹.

3. A Radical Change for the Albanian Judiciary

Against this background, and turning more closely to our subject “Strengthening Judicial Cooperation in Criminal Matters in the Light of EU Enlargement”, I would first observe that judicial cooperation in criminal matters appears to be of crucial relevance for each and every benchmark previously indicated.

Following Albania’s accession to the European Union, the instruments of cooperation will radically improve and change for the better whilst, simultaneously, the responsibility of the Albanian judiciary will increase accordingly.

In particular, once within the EU, the instruments to be applied among Albania and other Member States will change: from intergovernmental instruments at bilateral or multilateral level to those based on the principle of mutual recognition of judicial

⁸ Accession of 2004: Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia; Accession of 2007: Bulgaria and Romania; Accession of 2013: Croatia.

⁹ Council’s Press Release, *Second meeting of the Accession Conference with Albania at ministerial level*, 15 October 2024, <https://www.consilium.europa.eu/en/press/press-releases/2024/10/15/second-meeting-of-the-accession-conference-with-albania-at-ministerial-level/>. The European Union delegation was led by Péter Szijjártó, Minister of Foreign Affairs and Trade, on behalf of the Hungarian Presidency of the Council of the European Union, with the participation of Commissioner for Neighbourhood and Enlargement, Olivér Várhelyi. The Albanian delegation was led by Edi Rama, Prime Minister of Albania.

¹⁰ *European Union Common Position – Cluster 1: Fundamentals*, of 11 October 2024, AD 18/24, CONF-ALB 3, p. 5 ff.

¹¹ *Ibidem*, p. 12 ff.

decisions¹². The latter relies on the principle of *mutual trust* among the issuing and executing judicial authorities of the Member States concerned. Whilst mutual recognition was referred to as the *cornerstone* of judicial cooperation by the European Council already more than 25 years ago, mutual trust among judicial authorities of the Member States still appears far from being fully implemented, at least in a harmonious manner, across all Member States.

4. Mutual Recognition and Mutual Trust

Mutual recognition provides multiple advantages such as faster procedures, recourse to standardised forms for requests, very limited grounds for refusal and, most importantly, no role for political discretion, particularly in extradition matters, with all decisions being of a purely judicial nature and removed from political intervention.

Having had the privilege to negotiate most of the instruments of mutual recognition in Brussels, during my more recent experience as deputy prosecutor general in Naples I also had the opportunity to examine the concrete functioning of these instruments and the added value they have provided to practitioners in their everyday work.

In my experience, the real issues in the functioning of the instruments are not so much related to the operation of mutual recognition but rather to the establishment of an effective mutual confidence climate. Whilst the functioning of mutual recognition is provided for by binding legal instruments and, ultimately, is in the hands of the European Court of Justice, mutual confidence cannot be established by decree, nor by directive or regulation; as the French would say: “*La confiance réciproque ne se décrète pas...*”.

Every Member State may be confronted with a situation where mutual mistrust may prevail over mutual confidence due to various factors. These factors may range from conditions of detention in the prisons of the State where a person may be surrendered to the system of appointment or career progression in the judiciary or to any other form of violation of the rule of law.

Even the country I know best, Italy, may have suffered from this “mistrust factor” as an indirect consequence of some judgments of the European Court of Human Rights in Strasbourg concerning conditions of detention in Italian prisons¹³. In this judgment, the Court concluded that there was a violation of art. 46 ECHR¹⁴ because the violation of the

¹² For instance, Council Framework Decision 2002/584/JHA, cit., on the European Arrest Warrant; Directive 2014/41/EU of the European Parliament and of the Council, *regarding the European Investigation Order in criminal matters*, of 3 April 2014, in OJ L 130, of 1 May 2014; Regulation (EU) 2018/1805 of the European Parliament and of the Council, *on the mutual recognition of freezing orders and confiscation orders*, of 14 November 2018, in OJ L 303, of 28 November 2018; Regulation (EU) 2023/1543 of the European Parliament and of the Council, *on European Production Orders and European Preservation Orders for electronic evidence in criminal proceedings and for the execution of custodial sentences following criminal proceedings*, of 12 July 2023, in OJ L 191, of 28 July 2023; Regulation (EU) 2024/3011 of the European Parliament and of the Council, *on the transfer of proceedings in criminal matters*, of 27 November 2024, in OJ L, 2024/3011, of 18 December 2024.

¹³ See in particular European Court of Human Rights, Judgment of 8 January 2013, Applications nos. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 and 37818/10, *Torregiani and Others v. Italy*.

¹⁴ Art. 46 ECHR, Binding force and execution of judgments: “1. *The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.* 2. *The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.* 3. *If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two-thirds of the representatives entitled to sit on the committee.* 4. *If the Committee of Ministers considers that a High Contracting Party*

applicants' right to adequate conditions of detention did not stem from isolated incidents but from a systemic problem arising from chronic dysfunction of the Italian prison system which had affected and remained liable to affect a large number of persons. The situation complained of therefore amounted to a practice incompatible with the Convention. Consequently, the national authorities were required by the Court to put in place, within one year, a remedy or combination of remedies with preventive and compensatory effect affording real and effective redress in respect of Convention violations stemming from overcrowding in Italian prisons, what they did.

Following that judgment, many EU countries with which Italy had always cooperated excellently began refusing Italian active European Arrest Warrants on grounds of possible inhuman treatment or requesting additional guarantees before surrender¹⁵.

A similar situation also originated by the case law of the EU Court of Luxembourg¹⁶ also referring to conditions of detention in the issuing State. The Grand Chamber of the Court of Justice affirmed for the first time that, before surrendering a person for execution of a European Arrest Warrant, the executing State must satisfy itself that conditions of detention in the issuing State comply with art. 4 of the Charter of Fundamental Rights of the European Union¹⁷, which enshrines the prohibition of inhuman or degrading treatment or punishment, and the corresponding art. 3 ECHR¹⁸, as interpreted by Strasbourg case law.

5. The Way Forward

Again, if each and every Member State may be subject to a mutual confidence crisis in its relationship with the other partners, it is even more probable that this could become a possible problem for future judicial relationships with new Member States.

Indeed, it cannot be ruled out that the entry into application of one or more mutual recognition instruments in relations with the new Member States may be delayed pending verification of the full compliance of the latter's judicial systems with the principle of rule of law.

An important precedent in this direction is represented by the Protocol concerning the admission of Bulgaria and Romania to the European Union¹⁹, which delayed the application of some instruments of judicial cooperation with these two Countries, conditioning it upon verification "*that the necessary conditions for the application of all parts of the acquis concerned have been met in that State*".

refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two-thirds of the representatives entitled to sit on the committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1. 5. If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of paragraph 1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case".

¹⁵ Commission Staff Working Document, *Statistics on the practical operation of the European arrest warrant – 2022*, of 29 May 2024, SWD(2024) 137 final.

¹⁶ Court of Justice of the European Union, Judgment of 5 April 2016, Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*.

¹⁷ Art. 4 CFREU, Prohibition of torture and inhuman or degrading treatment or punishment: "*No one shall be subjected to torture or to inhuman or degrading treatment or punishment*".

¹⁸ Art. 3 ECHR, Prohibition of torture: "*No one shall be subjected to torture or to inhuman or degrading treatment or punishment*".

¹⁹ *Protocol concerning the conditions and arrangements for admission of the republic of Bulgaria and Romania to the European Union*, in OJ L 157, of 21 June 2005, p. 29.

Against this background, the importance of existing European Networks in the field of judicial cooperation and judicial training to create and consolidate the climate of essential mutual trust for the functioning of the principle of mutual recognition should never be underestimated.

The European Judicial Network in Criminal Matters (EJN)²⁰ and the European Judicial Training Network (EJTN)²¹, within their respective competences, play a fundamental role in creating this “mutual confidence atmosphere”, not only by facilitating and smoothing judicial cooperation or offering training courses but also by providing European judges and prosecutors with opportunities to meet in person or virtually, to speak with each other, to exchange experiences, good practices or information, in a word: to know each other.

Mutual knowledge is a prerequisite of mutual trust and is also its first building factor. This is particularly relevant for the perception that each candidate country will be able to present once accession is completed, particularly in the fields of the fight against corruption and the independence of its judiciary. Incidentally, in the word “judiciary” both the categories of judges and prosecutors are to be included, taking into account their respective roles in the functioning of each mutual recognition instrument.

It is now for the Albanian Judiciary to play the game. The deep experience its Judges and Prosecutors have already acquired with the long-standing implementation of bilateral and multilateral instruments, in particular with the European Conventions of 1957 and 1959, respectively in the field of extradition and mutual legal assistance in criminal matters²², will certainly help and guide them all along this new challenge.

²⁰ Council Decision 2008/976/JHA, *on the European Judicial Network*, of 16 December 2008, in OJ L 348, of 24 December 2008.

²¹ Founded in 2000 by the Bordeaux Charter, the EJTN is an international non-profit association governed by the provisions of Belgian law and the principal platform and promoter for the training and exchange of knowledge of the European judiciary. EJTN’s fields of interest include EU, civil, criminal and commercial law and linguistics and societal issues training. The vision of EJTN is to help to foster a common legal and judicial European culture. Its activities cover both initial and continuous training, and are delivered in close cooperation with the Members, Associate Members, Observers and Partners.

²² *European Convention on Extradition* (ETS No. 024), of 13 December 1957; *European Convention on Mutual Assistance in Criminal Matters* (ETS No. 030), of 20 April 1959.